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Supreme Court, U.S.
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No. _____

Supreme Court, U.S.
FILED
MAY 31 2002
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IN THE

SUPREME COURT OF THE UNITED STATES

ELMER BEN DOWNS - PETITIONER

vs.

POSTMASTER GENERAL - RESPONDENT (S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ELMER BEN DOWNS
1808 HARDESTY DRIVE
LOUISVILLE, KY 40216
502 - 774 - 4593

19 pg

QUESTION(S) PRESENTED

1 - Why did the United States Appeals Court and-District Court fail to apply the decision of the United States Supreme Court decisions of Faragher Vs City Of Boca Raton #97-282 and Ellerth vs.Burlington Industries #97-799?

2 - Why did the United States Appeals Court and the Federal District Court court fail to recognize that the previous Equal Employment Opportunity cases numbers I-D-401-0021-98 and I-D-401-1035-96 are prerequisites to retaliation and are part of this retaliation case? And there were three Equal Employment Opportunity complaints filed against this same supervisor?

3 - Why did the United States Appeals Court and the Federal District Court fail to see that the employer is required to prove the Affirmative Defense when no employment action is taken against the employee as the United States Supreme Court ruled in Faragher vs. City Of Boca Raton #97-282 and Ellerth vs. Burlington Industries #97-799?

4 - Why did the United States Appeals Court and the Federal District Court fail to see that this case could proceed as a hostile work environment claim even when no employment action was taken by the employer as the United States Supreme Court ruled in Ellerth vs Burlington Industries?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....I

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....3

CONCLUSION.....5

INDEX TO APPENDICIES

APPENDIX A - Decision of the United States Court of Appeals

APPENDIX B - Decision of the United States District Court

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Ellerth vs. Burlington Industries.....2

(United States Supreme Court 97-799)

Fragher vs. city of Boca Raton.....2

(United States Supreme court 97-282)

STATUTES AND RULES

28 U.S.C. § 1254 (i).....1

Title VII. Pub. L. 88-352; 1964 1

Pub. L. 102-166, Amended in 1991..... 1

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of Appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was March 7, 2002. No petition for rehearing was filed in my case. The jurisdiction of this court is invoked under 28 U.S.C. 55 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the :

Civil Rights Act of 1964

Civil Rights Act of 1991

STATEMENT OF THE CASE

1-The employer postal Service stated in the Motion To Dismiss this case that the postal service did not implement an employment action against the plaintiff since no employment action was taken the employer must prove the new Affirmative Defense. The United States Supreme Court ruled in Faragher vs. City of Boca Raton #97-282 and Ellerth vs Burlington Industries #97-799 that when an employer decides not to take an adverse employment action, the employer must prove the new Affirmative Defense that includes two necessary elements;

> (A) - The employer exercised care to prevent and correct promptly any harassing behavior and,
> (B) - The Employee failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm.

No where in the record is there evidence that shows the employer proved this two prong Affirmative Defense

2-This plaintiff-Petitioner had timely filed two previous equal Employment Opportunity Complaints against the same supervisor. (Equal Employment Complaints,# l-D-401-0021-98 and #1-D-401-1035--96). Prior Equal Employment Opportunity Complaints must be filed and is necessary in order to file a discrimination complaint based on retaliation. So the facts of this case are more than merely being followed as the defense claims.

3-Based on the fact that the employer did not take an adverse employment action, this case could and should have proceeded and not dismissed because in Ellerth vs. Burlington Industries, #97-799 the United States Supreme Court ruled that when no job action is taken that creates a hostile work environment a discrimination claim can proceed the same as when an adverse job action creates a hostile work enviroment. While the Faragher and Ellerth decisions addressed sexual harassment, the Supreme Court's analysis drew upon standards set forth in cases involving harassment on other protected cases. This new Affirmative Defense gives credit to employers if they prove this Affirmative defense.

REASONS FOR GRANTING THE PETITION

The United States District Court and the United States Appeals Court has failed to correctly view all the evidence submitted by the plaintiff-appellant and errored in granting a summary judgment in favor of the defendant and dismissed this case:

1 The District Court and the Appellant Court stated that the plaintiff-appellant did not alledge an act that would constitute an adverse employment action. This plaintiff-appellant agrees with that fact but the District Court and the Appellant Court failed to reference and view these Supreme Court decided cases in the record, Faragher vs City of Boca Raton and Ellerth vs. Burlington Industries. In these cases the United States Supreme Court ruled in these recent cases (in 1998) that when an employer does not take an adverse

employment action, the employer must prove the Affirmative Defense that includes two necessary elements:

> 1-The employer exercised care to prevent and correct promptly any harassing behavior and,
> 2-The employee failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm.

No where in the record is there evidence that the employer proved this two prong Affirmative Defense. Since the employer took no employment action, the burden to prove shifts to the employer to prove the Affirmative Defense.

2 The Appeals Court stated that it had modified the standard required to prove a claim of retaliation in 1990. The more recent cases of Ellerth vs. Burlington Industries and Faragher vs. City of Boca Raton decided by the United States Supreme Court in 1998 are more recent and should prevail. The Appeals Court agreed with the District Court with respect to the plaintiff-appellant's hostile work environment claim. If there is no adverse employment action taken by the employer, the United States Supreme Court ruled in Ellerth vs Burlington Industries, 118 S.Ct.at 2265, that a claim can proceed as a hostile work environment claim even when there is no adverse employment action taken.

3 The plaintiff-appellant cannot be obligated to prove retaliation elements before the employer proves the Affirmative Defense because if the employer does not prove both elements of the Affirmative Defense, the plaintiff-appellant should receive a decision in his favor.

4 The Appeals Court stated that the supervisor followed the plaintiff-appellant on one occassion. An important fact is that the supervisor was not even on duty at the time of the incident. The supervisor had put on his overcoat and was on his way out. Plus this claim also involves two previous Equal Employment discrimination claims against the same supervisor. They are Equal Employment claim numbers, l-D-401-0021-98 and I-D-401-1035-96. So the plaintiff-appellant had prior problems with this supervsor before he filed this complaint and that same supervisor had established a pattern of harassing behavior toward the plaintiff-appellant on three separate occassions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Elmer Ben Downs

Date: July 5, 2002

CONTENTS OF APPENDIX

Decision of the United States Court of Appeals ..1a

Decision of the United States District Court.....6a

APPENDIX

Appendix-A

No. 01-5975

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELMER B. DOWNS, JR.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
V.	)	ORDER
	)	
POSTMASTER GENERAL, U.S. Postal Service,	)	
	)	
Defendant-Appellee.	)	
	)	

Filed March, 7 2002

Before: DAUGHTREY, MOORE and COLE, Circuit Judges.

This pro se litigant appeals a district court judgment dismissing his complaint filed under Title VII of the Civil Rights Act of 1964,42 U.S.C. § 2000(c)-I, etseq. This case has been referred to a panel of the court pursuant to Rule 346)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Elmer B. Downs, Jr., a former U.S. Postal Service employee, brought suit under Title VII alleging that a supervisor intimidated him in retaliation for prior complaints of discrimination.

The district court concluded that Downs failed to allege any act by the Postal Service that would constitute an adverse employment action, and that Downs failed to allege facts sufficient to constitute a hostile work environment. Accordingly, the district court granted summary judgment in favor of the defendant and dismissed Downs's complaint. This appeal followed.

On appeal, Downs essentially reasserts the claims set forth in the district court.

This court reviews de novo the district court's order granting summary judgment to defendants. *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 509 (6th Cir. 2001). A grant of summary judgment will be upheld only if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence and draw all reasonable inferences therefrom in the light most favorable to the non-movingparty. *Williams v. Int 7 Paper Co.*, 227 F.3d 706, 710 (6th Cir. 2000). If the moving party meets its burden of production, the non-moving party must produce more than a mere scintilla of evidence to survive summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Upon review, we conclude that the district court properly granted summary judgment in favor of the defendant. In *Norris v. Oldham County Fiscal Court*, 201 F. 3d 784 (6th Cir. 2000), this court modified the standard required to prove a claim of retaliation. A plaintiff must now prove that: (1) he engaged in activity protected by Title

VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. *Id.* at 792 (citing *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990) (outlining the previous standard for prima facie case of retaliation under Title VII)). Once the plaintiff establishes a prima facie case, the burden of production of evidence shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. *Id.* at 792-93 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)) The plaintiff then must demonstrate that the proffered reason was not the true reason for the employment decision. *Id.* at 793 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248,256 (1981)). The plaintiff bears the burden of persuasion throughout the entire process. *Id.*

In the immediate case, the record is devoid of any indication whatsoever that Downs suffered any adverse effect on the terms, benefits, or conditions of his employment. Thus, Downs did not make a prima facie case of employment discrimination because he failed to allege an adverse employment action.

Similarly, the district court properly granted summary judgment to defendant with respect to Downs's hostile work environment claim. In order to establish a hostile work environment claim, an

employee must show the following: (1) the employee is a member of a protected class, (2) the employee was subject to unwelcomed retaliatory harassment, (3) the harassment was based on the employee's protected activity, (4) the harassment created a hostile work environment, and (5) the employer failed to take reasonable care to prevent and correct any harassing behavior. *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 560-61 (6th Cir. 1999).

A hostile work environment occurs "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal quotations and citations omitted). Both an objective and a subjective test must be met: the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive and the victim must subjectively regard that environment as abusive. *Id.* at 21-22. Isolated incidents, however, unless extremely serious, will not amount to discriminatory changes in the terms or conditions of employment. *Morris,* 201 F.3d at 790. Appropriate factors for the court to consider when determining whether conduct is severe or pervasive enough to constitute a hostile work environment include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23.

The record is devoid of evidence of discrimination that is severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive. Downs merely alleges that a supervisor followed, stared at or stalked him on one occasion.

Accordingly, the district court's judgment is affirmed pursuant to Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____/s

Clerk
Leonard Green

Appendix - B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:OOCV-836-H

Before: Judge John G. Heyburn

ELMER B. DOWNS PLAINTIFF

V.

WILLIAM J. HENDERSON,
POSTMASTER GENERAL DEFENDANT

Filed July 27, 2001

MEMORANDUM AND ORDER

Plaintiff, Elmer B. Downs, a former employee of the United States Postal Service (the "Postal Service"), alleges that the Postal Service violated Title VII of the Civil Rights Act of 1984. More specially, he says that a supervisor intimidated him in retaliation for prior complaints of discrimination. Plaintiff has filed numerous EEOC claims against the Postal Service. Defendant moves for summary judgment, asserting that Plaintiff s claims are barred due to various statute of limitations grounds and due to the failure to exhaust various administrative remedies. The Court does not discount those arguments.

However, the Court believes that the case may be resolved on other grounds.

Plaintiff has failed to allege any act by the Postal Service which would constitute an adverse employment action. Consequently, the only basis for a retaliation or discrimination claim would be that the Postal Service through the actions of its employees created a hostile work environment. The Court has carefully reviewed Plaintiff's allegations in this complaint. Plaintiff alleges that an employee of the Postal Service "followed," "stared at" or "stalked" him on perhaps one occasion. All his allegations are a retelling of the same limited series of events. The Court does not condone this conduct, if it occurred. However, such conduct falls far short of the degree or quantity sufficient to constitute or create a hostile work environment. Due to a complete insufficiency of evidence, Plaintiffs claim fails as a matter of law.

Plaintiff has asserted that he needs additional time in which to obtain discovery on his claims. However, Plaintiff needs no discovery to tell the Court exactly what happened from his own personal knowledge. Plaintiff has not brought forth such facts, which could be known to him. Plaintiff has failed to allege any facts or actions by the Postal Service from which any reasonable jury could conclude either discrimination or the creation of a hostile work
environment. Further discovery will not change these circumstances. Consequently, Plaintiff s claim must be dismissed.

The Court being otherwise sufficiently advised, IT IS HEREBY ORDERED that Defendant's motion for summary judgment is SUSTAINED and Plaintiff's complaint is DISMISSED WITH PREJUDICE.
This 26th of July, 2001.

_____/s
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Elmer B. Downs, Jr., Pro Se
David L. Huber, AUSA